No. 2644

United States
Circuit Court of Appeals
For the Ninth Circuit

MANEY BROTHERS & CO. (a co-partnership consisting of J. W. MANEY, JOHN MANEY, HERBERT G. WELLS and E. J. WELLS),
Appellants,

VS.

CRANE CREEK IRRIGATION LAND & POWER COMPANY, CRANE CREEK IRRIGATION DISTRICT, SUNNYSIDE IRRIGATION DISTRICT, PORTLAND WOOD PIPE COMPANY, SLICK BROTHERS CONSTRUCTION COMPANY, Limited, S. C. COMERFORD, E. D. FORD, A. G. BUTTERFIELD and R. C. McKINNEY,
Appellees,

CRANE CREEK IRRIGATION DISTRICT and SUNNYSIDE IRRIGATION DISTRICT,
Cross-Appellants,

VS.

MANEY BROTHERS & CO. (a co-partnership consisting of J. W. MANEY, JOHN MANEY, HERBERT G. WELLS and E. J. WELLS),
Cross-Appellees.

BRIEF OF APPELLEE.
PORTLAND WOOD PIPE COMPANY.

Upon Appeal from the United States District Court for the District of Idaho, Southern Division.

WILBUR, SPENCER & BECKETT,
Solicitors for Appellee,
Portland Wood Pipe Co.
Residence, Portland, Oregon.

Gotshall Printing Co., 221½ Stark St.

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STATEMENT OF THE CASE.

There have been a number of statements made in this case by other parties to the record, and for the purpose of raising the single question we desire to call

your attention to in this brief, it will not be necessary to make an extended statement.

The Honorable Frank S. Dietrich, District Judge, who tried this case, held that the Mechanic's lien in favor of the PORTLAND WOOD PIPE COMPANY upon some of the property involved was superior to the lien attempted to be created by the mortgage of Maney Brothers & Co.

Whether or not the Judge was correct in his holding is the only question we care to discuss in this brief.

The contract between the Crane Creek Irrigation Land & Power Co. and the Sunnyside Irrigation District, and the contract between the Crane Creek Irrigation Land & Power Co. and the Crane Creek Irrigation District were both signed on the 22nd day of August, 1910, and they were identical in all of their material provisions.

The only difference in these two contracts arises on account of one Irrigation District embracing more land than the other. Both of these contracts provided for conveyances from time to time by the Crane Creek Irrigation Land & Power Co. to the Districts for completed work as work progressed, and both these contracts provided that the Crane Creek Irrigation Land & Power Co. would convey to these two districts said completed work free from all encumbrances.

The contract between Maney Brothers & Co. and the Crane Creek Irrigation Land & Power Co., which provided for the construction of a reservoir was dated

September 29th, 1911, a little more than a year after the above mentioned contracts between the Crane Creek Irrigation Land & Power Co. and the two Irrigation Districts.

The mortgage of Maney Brothers & Co. was provided for in said contract, and the note and mortgage in favor of Maney Brothers & Co. was also executed on the 29th day of September, 1911.

POINTS AND AUTHORITIES.

Upon the record of this case as presented to this Court, the trial Court properly held that the Mechanic's Lien of the Portland Wood Pipe Co. was superior to the lien created by the mortgage of Maney Brothers & Co.

Creer and others vs. Cache Valley Canal Co., 4 Idaho 280, 38 Pac. 653.

Gardner et al. vs. Leck et al., 54 N.W. 746.

Oriental Hotel Co. et al. vs. John Griffiths, 30 L. R. A. 765.

Davis vs. Bilsland, 18 Wallace 659.

Holt vs. Henley, 232 U. S. 637.

Garland vs. Bear Lake & River Water Works & Irrigation Co., 9 Utah 350.

ARGUMENT.

Upon pages 184 to 185 of the Transcript of Record in this case will be found memorandum decision on claim of plaintiff for lien and Maney Brothers' mortgage, and the same is as follows:

The suit was commenced by the Portland Wood Pipe Company, as plaintiff, to foreclose a mechanic's lien for material furnished to the defendant Slick Brothers Construction Company, for the construction of an irrigation system in Washington County, Idaho, against Slick Brothers Construction Company, a corporation, the Crane Creek Irrigation Land & Power Company, a corporation, Maney Brothers & Company, a corporation, and others, including the Crane Creek Irrigation District and Sunnyside Irrigation District, irrigation districts organized under the laws of Idaho, as defendants. Briefly stated, the facts out of which the controversy has grown are, that, in August, 1910, the defendant Crane Creek Irrigation Land & Power Company, reciting that it was the owner of certain water rights, a reservoir site, and rights of way for canals upon which certain construction work had been done, entered into separate contracts with the two defendant irrigation districts, under the terms of which it was to complete the construction of the reservoir and canals as called for by plans and specifications attached, and, with certain reservations, to make conveyance thereof in undivided interests to the two irrigation districts severally, for the permanent ownership and use by them for the irrigation of the lands which they embrace. In payment for the system when and as the same should be completed the districts agreed to turn over to the Power Company their several coupon bonds at their face value to the amount of the specified purchase price. In some of their features the contracts are unusual, and are probably to be accounted for by the fact that under the laws of the state, as they existed at the time of the

execution of the contract, irrigation districts were authorized to dispose of their bonds only by a sale for cash to the highest bidder or by an exchange thereof at par for irrigation works; they could not use them in payment for construction work. Such is the view taken by the Supreme Court of California of a law of that state, of the same general purpose and scope.

Hughson v. Carne, 115 Cal. 404; 47 Pac. 120. The same court later held that it was competent for districts to enter into contracts for the purpose of systems to be constructed.

Stowell v. Rialto Irr. Dist., 155 Cal. 215; 100 Pac. 248. It is to be inferred that the contracts here were drawn to conform with the views expressed in these decisions.

The Power Company entered into a contract for construction work on the system with Maney Brothers & Company, and later with the Slick Brothers Construction Company for the completion of the system. It settled with Maney Brothers by the execution of a note for a large amount, secured by a mortgage upon the system, only a small part of which was then completed, and with Slick Brothers Construction Company by a written agreement, pursuant to which it was to deposit with a trustee certain bonds and securities, the proceeds of which were to be paid out to creditors in the manner therein provided. At the time this suit was commenced there was due to Maney Brothers, on account of the mortgage note. $35,986.10, with interest thereon at the rate of six per cent from December 27, 1913. Accord-

ing to the contention of Slick Brothers Construction Company, there was also due to it a large balance, for which it had filed notice of a mechanic's lien, which it sought to foreclose in this suit. At the close of the trial I held that the Power Company had substantially complied with the agreement of settlement by placing the bonds and other securities in the hands of the trustee agreed upon, and therefore denied relief to Slick Brothers. Admittedly there is due to the plaitniff, the Portland Wood Pipe Company, $10,317.44, which is the basis of the lien upon which the complaint is predicated.

The system was completed, and in accordance with the contract between the irrigation districts and the Power Company it was conveyed in separate shares to the districts, and at the time the suit commenced they were the owners of the legal title thereto. As already stated, there is no controversy as to the amount due from the Power Company to Maney Brothers, or from Slick Brothers Construction Company to the Portland Wood Pipe Company, but the irrigation districts contend that they held the property free from both the mortgage and the plaintiff's claim of lien.

First disposing of

THE LIEN CLAIM OF THE PORTLAND WOOD PIPE CO.

Briefly stated, the districts' contention is that they are municipal corporations, that their property is dedicated to public uses, and that therefore it is exempt from the operation of the mechanic's lien laws of the

state. It is argued that while Section 5110 of the Revised Codes in general terms confers the right of lien upon any person performing labor upon or furnishing materials to be used in the construction of any work, the section is not to be deemed to extend the right of lien to property belonging to the state or municipal corporations. Attention is called to Section 5111, which expressly provides for a lien in favor of sub-contractors, laborers, and persons furnishing material (but not original contractors), in case of structures belonging to "any county, city, town or school district," and to still another provision of the law by which contractors are required to furnish bonds to municipal corporations, including irrigation districts, to indemnify not only the corporation, but also any person furnishing labor or material, and the conclusion is drawn from the several provisions that the legislature did not intend to provide for a lien in favor of either a material man or a laborer in the case of structures or improvements belonging to an irrigation district. It would be strange for the legislature to extend the right of lien to buildings and other property belonging to a county, city, town, or school district, and withhold it in the case of an irrigation district; and it is difficult to believe that such was the intention. But that question is not involved here. The material furnished by the plaintiff was for the construction of works belonging to the Power Company, not to the irrigation districts. It is true that the system was to be conveyed to the irrigation districts, but doubtless as they understood the law they could not contract to pay bonds for the construction of irrigation works, and

they therefore intended that the construction should be for the Power Company, and that they would buy the completed structures. That being the case, they took title subject to such liens as incumbered the property when it came into the possession and ownership of the Power Company, and very clearly the Power Company acquired title to the property subject to the liens of the workmen who built it and the material men who furnished the material for its construction. *Creer v. Cache Valley Canal Co.,* 4 Idaho, 280; 38 Pac. 653. *Garland v. Irrigation Company,* 9 Utah, 350; 34 Pac. 368; 163 U. S. 687. *Fosdick v. Schall,* 99 U. S. 235. *Holt v. Henley,* 232 U. S. 637. The districts will not be permitted to take a position now inconsistent with that which they maintained that before the plaintiff furnished the pipe material it made inquiry and learned the nature of the contract between the Power Company and the irrigation districts, and was thus advised that the irrigation districts did not claim that they owned the property, or that the Power Company was merely a construction company. There is no contention here that the districts required the Power Company to give a bond, which was their bounden duty to do if it was deemed to be a construction company. Undoubtedly the irrigation districts held out to the world that they were merely the purchasers of this property, and were not engaged in its construction. They cannot now be permitted to change their position, to the hurt of persons who in good faith dealt with the Power Company as the owner of the property.

I reject the suggestion that inasmuch as Slick Bro-

thers Construction Company entered into the contract of settlement already referred to, with the Power Company, and thus waived its lien, the right of the plaintiff was thereby cut off. The statute confers upon the material man an independent right to a lien, of which he cannot be divested without his consent.

THE MANEY BROTHERS MORTGAGE.

We now come to a consideration of the validity and dignity of the Maney Brothers mortgage. There is no dispute that there remains due thereon a balance of $35,986.10, besides interest from December 27, 1913, at the rate of six per cent per annum. The Power Company, mortgagor, makes no resistance, and the only defense is that interposed by the irrigation districts, which contend that under their contract of purchase and the subsequent deeds made in pursuance thereof, they took an unincumbered title to the property. As already stated, the contract of purchase was executed on August 22, 1910, whereas the mortgage was not made until September 29, 1911; and the deeds were all executed at still later dates. Presumably a question having arisen as to the status of the mortgage lien, the mortgagees on July 10, 1914, procured the passage of a resolution, at a joint meeting of the boards of directors of the two districts, expressing the view of the boards that the title received by the districts was subject to the mortgage, but there was appended an express disclaimer of any intention to waive any rights which the districts then possessed. It is scarcely necessary to observe that with this proviso the resolution did not even purport to en-

large the rights of the mortgagees. Later, namely, on August 18, 1914, the boards of directors, acting separately, passed a resolution ratifying a certificate executed by the president of each district, dated June, 1914, certifying to certain undisputed facts touching the history of the transaction and purporting to concede that the mortgagees' rights were superior to those of the districts. But both the certificate and the subsequent raification were without consideraion, and even were it to be assumed that an irrigation district may be estopped by the unauthorized acts of its officers, there were wanting here some of the essential elements of estoppel. I am therefore clearly of the opinion that both the resolutions and the certificates must be laid aside as having no efficacy whatsoever.

There remains the general question whether the transfer consummated by the deeds delivered from time to time as portions of the system were completed, relates back to the date of the contract and cuts off the intervening mortgage lien. It is conceded that for certain purposes at least this doctrine of relation is to be recognized, but it is not to be given effect here, it is argued, because it would work an injustice and it is never invoked where such would be the result. The supposed injustice lies in the fact that if the mortgage is defeated the mortgagor may be unable to recover all of the mortgage debt. The gist of the contention seems to be that in case of an executory contract for the sale of real property the vendor retains the power to transfer the legal title to a third person or subject it to a lien, and in such cases the transferree or mortgagee is subrogated

to the rights of the vendor, and is entitled to receive the unpaid portion of the purchase price. Specifically it is urged that the mortgage lien here attached to the unpaid purchase price, and that the districts having notice, both constructive and actual, of the existence of the mortgage, paid the Power Company at their peril. But the application of the principle to the facts in hand is not so plain or simple. The contract in question was for the purchase of an indivisible unit of property. No substantial part of it was in existence at the time the contract was made; it was largely to be created before it could be transferred. Admittedly, when completed it was to be conveyed free from all incumbrances. What then were the rights and duties of the districts? Clearly it was their right to take such course as was reasonably necessary to secure the performance of the contract, and, as already stated, one of the provisions of the contract was that they should receive title to the completed system free from incumbrances, of which condition mortgagees at all times had knowledge. Now what in fact did they do? So far as the record shows, they paid the purchase price by turning their bonds over to the Power Company to be used by it in procuring the construction of and title to the property conveyed by the contract, and the bonds were so used. In view of the record, it is idle to talk about withholding the purchase price and applying it to the discharge of the mortgage indebtedness. Had such a policy been suggested at the outset, the contractors would doubtless have declined to proceed with the work, and if it had been adopted after the work was done, mechanic's liens would have been asserted against the property. That the lien of those who, by supplying

labor and material, created the property, was superior to the equity of the districts, I have already held, and that it was superior to the mortgage lien is scarcely open to controversy. Under such circumstances, it was the right of the districts to see that the purchase price was applied to the discharge of the superior liens; those of contractors, laborers, and of material men. If we assume that thereafter it was their duty to withhold from the vendor and pay to the mortgagee the balance, it need only be said that there is no showing that there was any balance. So far as appears none of the bonds constituting the purchase price has been turned over to or retained by the Power Company for its own profit.

It is now quite immaterial that the mortgage indebtedness originated in construction work done by the mortgagees upon a branch of this irrigation system. If we assume that up to the time they took the mortgage their right to a mechanic's lien remained unimpaired, they abandoned that right by taking the mortgage. It may very well be true that if they had then insisted upon such a lien the project would have fallen through and they would have been left with worthless security. But, however, that may be, and whatever may have been their motives, they waived their statutory lien and took the mortgage, and their status here is that of a mortgagee and nothing more.

There is this further consideration: The districts, as we have seen, were under no obligation to pay the Power Company money; the price was to be paid in bonds. If the mortgagees were resting upon the theory that as holders of a mortgage they were in a sense

subrogated to the right of the Power Company to receive the purchase price, why did they not demand that a part of the purchase price be turned over to them? They apparently knew that the bonds were being delivered, and yet made no demand or protest. Great difficulty was experienced in negotiating the bonds even at heavy discounts. From the record can we say that the mortgagees would have been willing to take them at their face value or for that matter at any price? Upon their own theory, their mortgage at most conferred upon them a conditional right to receive a part of the unpaid purchase price. But the purchase price consisted not of money but of bonds, and at no time during the entire transaction did they intimate a willingness to accept bonds, nor up to the present time have they manifested such willingness. They are insisting upon the payment of their claim in money. As against their debtor, the Power Company, such is their right, but in view of the law, upon any state of facts either real or assumed, was it ever the duty of the districts to pay them any part of their demand in money. In view of these considerations it is thought that the lien of the mortgage does not extend to such property rights and interests as were covered by the contract and have been conveyed to the districts pursuant to the terms thereof. A foreclosure will therefore be granted only as to the other property described in the mortgage, including the interest reserved by the Power Company in the irrigation system.

As to attorneys' fees, possibly the amount testified to, namely, $1,000.00, would not be excessive for the Portland Wood Pipe Company, if counsel who rep-

resent it were not otherwise employed in the case, but taking into consideration the fact that the same counsel also represent the mortgagees and Slick Brothers, I am inclined to think $750.00 will be an adequate allowance on this account. As to Maney Brothers, their principal controversy, namely, that their lien extends to the property of the Irrigation Districts, is found to be without valid basis, and insofar as the legal services pertain to that controversy, they must themselves bear the expense. For other services they are entitled to recover, and $1,000.00 will be awarded on account thereof.

My conclusion as to the Slick Brothers claim was announced orally. As to the Comerford claim, after a ruling upon the controlling questions, I am advised of a complete settlement between the interested parties. Both the cross-complaint and the counter-claim will therefore be dismissed as settled.

Creer and others vs. Cache Valley Canal Co., 4 Idaho 280, 38 Pac. 653, 654. This case, in many particulars, is in point with the question under discussion, and I quote from the same as follows:

> "Suit by William O. Creer and others against the Cache Valley Canal Company and others for a balance claimed to be due for work and labor done by them in the construction of two canals for the defendant the Cache Valley Canal Company, and for a first lien upon said canal to secure said claim. Decree in the court below gave plaintiffs judgment for the amount claimed, and first lien upon the canal to secure the sum, and defendants appeal. Affirmed.

The stipulation of facts agreed upon in this case shows: That the Cache Valley Canal Company on or about the first day of May, 1892, constructed a main canal running from the Soda Springs, along the Oregon Short-line Railroad, to the NE ¼ of Section 1, in Township 9, S., Range 40 E., P. M. and about 4½ miles of the South Branch of said canal—in all, about 14 miles. On the 18th day of June, 1892, the Cache Valley Canal Co. executed a mortgage to James Thompson for the sum of $25,000 upon all of the canals thus constructed and upon those to be thereafter constructed. That the money so obtained by said mortgage was used in the construction of said canals, including that part on which the plaintiffs now claim a lien. On the 11th day of July, 1892, the plaintiffs made a contract with the Cache Valley Canal Co. by the terms of which the said plaintiffs were to construct what is called the "North Branch" of the said canal, for which they were to receive a certain stipulated price. They also agreed to construct what was termed the "South Branch and Laterals" of said Company's canal for a certain other stipulated sum. That the said plaintiffs fully performed their contract as before set forth, and completed said work on the 27th day of October, 1892. It is also stipulated that, if the plaintiffs are entitled to recover at all, the amount claimed in the complaint, and interest as claimed, is the amount that should be allowed; that the lands whereon said canal was constructed were then public lands of the United States, with the exception of three-quarter sections; that at all times

mentioned in the complaint, as fast as the said canals were constructed by the plaintiffs, as alleged in the complaint, the defendant the Cache Valley Canal Co. was the owner thereof; that in November, 1892, the said Cache Valley Canal Co. sold and transferred all of said canal's right-of-way, as far as said Company had acquired it to the Cache Valley Land and Canal Co.; that in April, 1893, the said last named Company acquired the right-of-way over all the public lands where its canal was constructed; that the plaintiffs herein were original contractors under the contract sued on."

"This appeal exhibits a most extraordinary state of facts. It is stipulated that the defendants owe the plaintiffs the sum demanded in their complaint, with interest thereon. It further appears from the record: That quite a large part of the property upon which this lien is claimed, and upon which the said James Thompson claims to have a mortgage, which he wishes the court to declare to be a prior lien to that of the plaintiffs, had no existence whatever when this said mortgage was given. That the plaintiffs constructed the whole of the North and South Branches of said canal after this mortgage was given, except about 4½ miles, which they had constructed before. The plaintiffs actually created this property which made the mortgage of the said Thompson, who is the appellant in this case, good; that is, the North and South Branches of the canal were not built—had no existence—when the mortgage was given. That they were built

by said plaintiffs, for which construction they have not been paid, except in part. And this suit is brought to secure the balance of the money that the defendants acknowledge was due plaintiffs for said work; and this court is asked to assist in preventing the plaintiff securing their pay, on technical objections, that are themselves without foundation. This appeal has no merit whatever."

Gardner et al. vs. Leck et al. The Minnesota case can be found in the 54th Northwestern Reporter at page 746, and we quote from the same, pages 748 and 749, as follows:

"There is nothing novel or unjust in a law which gives priority to the liens of mechanics and material men over those of other parties, originating subsequent to the commencement of the improvements on the land. In at least 20 states such laws have been enacted, and again and again have they been sustained by the courts. These states are named, and a synopsis of their lien statutes given, in Jones on Liens (sections 1187 and 1469). * * *

"The inevitable logic of what we have said is that, whenever a mortgage or other incumbrance or distinct lien originates subsequently to the commencement of the work on the ground, or the furnishing of materials at the same place, so that the world may have notice of the proposed improvement, it must yield to the claims of all who have contributed to the completion of the structure with their work or materials."

Oriental Hotel Company et al. vs. John Griffiths et al, 30 L. R. A. 765; 33 Southwestern 652; 53 American State Report 790. This is a case from the Texas Supreme Court and we quote from the LRA report, pages 776, 777 and 778, as follows:

> "The parties contracted with reference to and in view of the law as it then existed, and must be charged with notice of such rights as might accrue in the course of constructing the building, even if they had not been actually contemplated by the parties. *Brooks v. Burlington & S. W. R. Co.,* 101 U. S. 451, 25 L. Ed. 1060. When a building or other improvement is in course of construction, and any person takes a mortgage on the land upon which such building or improvement is situated, or on the improvement itself, he does so with the knowledge that it may be necessary for the completion of the building that other contracts should be made for labor and material, and it is clearly the policy of this state, as shown by its statute law, that an intervening mortgagee shall not destroy the statutory rights of persons that may be acquired thereafter in the course of constructing such building. The deed of trust in this case expressly reserved a lien upon the building thereafter to be constructed, and it is evident from the facts that the principal security of the bonds which were being sold was to be created by the completion of the contemplated hotel building. If the position taken by the counsel for the Oriental Investment Company be correct, then an intervening mortgagee could arrest the

progress of such work, destroy the statutory rights and liens of all persons who might be engaged in the work, and assert a lien by contract which would be superior to that given by the law under which the contract was made. This, we believe, cannot be maintained. * * *

"If the construction claimed by the plaintiffs in error be given to the statute of this state it would result in many absurd and unjust consequences. For example, let us suppose that Griffith's contract called for the completion of the hotel building, except the portions for which the other plaintiffs furnished material or upon which they performed labor, and that Griffith's contract had been complied with and the building completed, except the portions last named, and that after this was done Griffith's claim remaining unpaid, the deed of trust had been executed, as it was in this case, before the contracts were made under which the other plaintiffs acquired their rights. Now, by the construction claimed, Griffiths would have a prior lien upon the entire building, including all that the other plaintiffs had furnished, either in material or labor, and yet they who furnished the material or labor would have only a second lien thereon, for the reason that the mortgage intervening would take precedence over them. If we adopt the construction of the statute which seems to have been applied by the district court and approved by the court of civil appeals, the result will be, in such case as that stated above, that Griffiths would have his lien upon all the

work completed by him, and would be allowed to participate in the proceeds of that which had been added by the other plaintiffs, while they would be denied their statutory right to participate with him in the portion completed before the mortgage was given. Suppose that Griffiths had the entire contract for building the house, except the plastering and painting, and that, before the plastering and painting were done, the mortgage had been given; then the result would be that Griffths would have his lien upon the entire building, painted and plastered, while the other parties, who did the plastering and painting, and furnished the material therefor, would have a lien, equally with Griffiths, only upon the plastering and painting as it might be upon the walls, woodwork, or other parts of the house. Would it be practicable to separate these, in case of a foreclosure of the lien and sale, so as to adjust the rights of the parties in the proceeds of that portion consisting of the plastering and painting? In fact, it would be almost impossible to construct a house of any considerable value, except upon cash payments, without making such complications between the parties as would render it impracticable, if not impossible, to adjust their equities under any such rule of construction as that upon which this judgment is based. When a statute is plain and unambiguous in its terms, and not susceptible of more than one construction, courts are not concerned with the consequences that may result therefrom, but must enforce the law as they find it. But when a statute is ambiguous in its terms,

or susceptible of two constructions, then the evil results and hardships which may follow one construction may be properly considered by the court, and it is right that the court shall place upon the statute that interpretation, of which it is fairly susceptible, which will attain the just solution of the questions involved and protect the rights of all parties. Sutherland, Stat. Constr. Sec. 324. The construction that we place upon the statutes of this state, to the effect that when the erection of any building or construction of any improvement is begun, that constitutes the inception of all subsequent liens, is consistent with the entire body of the statute laws of this state on the subject, preserves the equality of all those who contribute to the construction of the building, and affords an easy solution and just result in case of intervening liens; for it is but just that he who acquires a lien upon property under such circumstances, and seeks to derive to himself the benefits of the improvement to be made, enhancing in value the security thus obtained, should be charged with notice that those who thereafter perform labor upon or furnish material for the completion of such improvement will be protected, under the law in the liens created by the statute. *Brooks v. Burlington & S. W. R. Co.,* 101 U. S. 443, 25 L. Ed. 1057."

Davis v. Bilsland, 18 Wallace 659, 21 L. Ed. 969. We quote from the Wallace report, from page 661, as follows:

"Thirdly. That the mortgage of the defendant

was entitled to priority over the claims of the plaintiff, which were not filed till November, 1869, and Bilsland did not commence work until after the mortgage was given.

"The language of the eigth section of the mechanic's lien law of Montana is unambiguous. The liens secured to the mechanics and materialmen have precedence over all other incumbrances put upon the property after the commencement of the building. And this is just. Why should a purchaser or lender have the benefit of the labor and materials which go into the property and give it its existence and value? At all events the law is clear, and the decree was right."

Judge Dietrich, in the opinion we have heretofore set out, cites *Holt v. Henley,* 232 U. S. 637, 24 Supreme Court Reporter 459. That case, on page 460 of the Supreme Court Reporter, cites a great many other cases. All these cases deal with the "after acquired property" clause of mortgages, and all of these cases deal with personal property after acquired instead of real estate, but there cannot be any difference upon principle in this line of cases than the doctrine we seek to revoke in this case.

Garland v. Bear Lake & River Water Works & Irrigation Company, 9th Utah 350, 34 Pacific 368, is another one of the cases cited by Judge Dietrich in the opinion above quoted, and we quote from the Pacific Reporter, page 370 and 371, as follows:

"The Jarvis-Conklin Mortgage Trust Company

insist that the court below erred in holding that the lien in favor of Corey Bros. & Co. on the canal was superior to the trust deed on the same property to secure its debt. "It is true that the Jarvis-Conklin Mortgage Trust Company obtained their deed of trust before Corey Bros. & Co. commenced work, and that the deed, by its terms, included all the property the water and irrigation company then had, or might thereafter acquire. When mechanics, material men, or other persons make improvements on land on which there is a mortgage or trust deed, such mortgage or trust deed will be superior to the lien to secure the mechanics or other persons; but the water and irrigation company had no ditch or canal which the deed of trust could transfer to the trustee, until Corey Bros. & Co., by their labor, brought it into existence, and as fast as they constructed the canal their lien attached to it. The trust deed could not transfer the canal from the water and irrigation company to the trustee until it was constructed; until the property came into existence. Under the mechanic's lien law relied upon, we do not think a man can execute a deed of trust on a canal to be constructed on the public lands, and then employ men to build it, and after they have done so, and claim the security of the lien, turn upon them, and say he had transferred the property to a trustee before their labor had brought it into existence. We are of the opinion that the court below was correct in holding the lien of Corey Bros. & Co. superior to the trust deed."

At the time Maney Brothers & Company received the note and mortgage from the Crane Creek Irrigation Land & Power Company, on the 29th day of September, 1911, it knew that prior to that time a contract had been entered into between the Crane Creek Irrigation Land & Power Company and these two Irrigation Districts; and it knew that the contracts with the Districts provided that the Crane Creek Irrigation Land & Power Company was bound to convey the property described in these contracts to these two Districts free from all incumbrances. It is a clear case of Maney Brothers & Company entering into a contract that it knew might result in the Crane Creek Irrigation Land & Power Company violating its contracts with the Irrigation Districts. Maney Brothers & Company knew that, if its mortgage was not paid prior to the time it became the duty of the Power Company to convey to the Irrigation Districts, that the above agreement to convey free from incumbrances would be violated, if the mortgage could be enforced against the Districts. Maney Brothers & Company do not come into this court with clean hands.

Maney Brothers & Company's mortgage calls for $87,000.00. Maney Brothers & Company were to build a reservoir and we suppose it was worth $87,000.00. It has been paid over $50,000.00 on its note and mortgage. There is still due it something in the neighborhood of $36,000.00.

It was not satisfied with taking a mortgage upon the work it did, but it is here claiming that it has a first

lien upon all the work done under the contract with Slick Brothers Construction Company, Ltd. Several hundred thousand dollars have been spent upon the work done ,under Slick Brothers Construction Company Ltd.'s contract.

When Maney Brothers & Company took its said mortgage, it knew that laborers and material men would put several hundred thousand dollars in the flumes, canals and siphons and ditches on this irrigation project; and it now claims that it is entitled to a lien for work it did on another part of the irrigation system superior to the claim of the laborers and material men that have done this additional and subsequent work.

There is not any equity or justice in such a proposition, but Maney Brothers & Company content themselves with resting upon what they call the vested rights of a mortgagee.

If Maney Brothers & Company thought they had a valid mortgage against the Irrigation Districts, why have they waited all this time to enforce this mortgage? They never did attempt to enforce it and they set up this vested-right-cry only after they are brought into court by the Portland Wood Pipe Company in attempting to collect its just debts and dues.

A good deal has been said in this record about the resolutions of the two Irrigation Districts and about the certificate of some of the officers of these Irrigation Districts, attempting to bolster up the mortgage of Maney Brothers & Company, attempting to give a

standing and validity. If one has a valid mortgage, he never attempts to bolster it up by resolutions and certificates and affidavits; he never tries to make some record some place else that will make such mortgage better than the mortgage record itself; he never tries to prop up, nor brace up, nor bolster up the record that he obtained in the ordinary way in filing his mortgage in the record provided by law. The very fact that all this attempt was made to establish the validity of this mortgage convinces us that Maney Brothers & Company doubted the validity thereof, as against these Irrigation Districts.

Maney Brothers & Company, if this mortgage had not been given, would have had a valid mechanic's lien upon the work that it did in the performance of its work under its contract with the Crane Creek Irrigation Land & Power Company. Maney Brothers & Company were not satisfied with this; it wanted something better. It not only wanted a mortgage upon the work it did, but it wanted a mortgage upon all the work anybody else ever did on this large irrigation project in these two Irrigation Districts. We believe it is perfectly apparent, from the record here, that, when Maney Brothers & Company built this reservoir, provided for in its contract, all the rest of this irrigation project was on paper. As a matter of fact, the reservoir would not be worth anything unless the balance of the irrigation system was completed.

This work of the Portland Wood Pipe Company, and others, breathed life into this paper irrigation pro-

ject and made it worth something, and made the mortgage of Maney Brothers & Company worth something. It seems to us that Maney Brothers & Company have overshot the mark. It seems to us they have been too avaricious. It seems to us it must shock the countenance of a chancellor when any one attempts to take an advantage of a situation such as this, and when one attempts to profit to the hurt of another, and reap where he has not sowed.

It is apparent that Maney Brothers & Company knew that from time to time the Power Company was executing and delivering its deeds to these Irrigation Districts, as the work was being completed, and it never objected; it never protested to the Irrigation Districts; it never protested to the Power Company. It thought that it would wait until the Portland Wood Pipe Company, and others similarly situated, had put their good money, labor and material into this irrigation system, and then it thought it would attempt to esablish a first lien thereon, and a lien thereon prior to the lien of any laborer or material man.

Judge Dietrich clearly saw this whole situation. He had before him the witnesses and he saw the iniquity and injustice of Maney Brothers & Company's attempt to shut out the material man and the laborer, and he could not be swayed by the sophistry of the vested rights of a mortgagee. His decision in this regard should be upheld.

WHEREFORE, the appellee, the Portland Wood

Pipe Company, respectfully submits that the decree of the District Court should be affirmed.

Respectfully submitted,

WILBUR, SPENCER & BECKETT,

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